Office - Supreme Court, U.S.
FILED
APR 2 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1053

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SOUTHERN PACIFIC TRANSPORTATION COMPANY
Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA,
Respondent,

and

CALIFORNIA DEPARTMENT OF TRANSPORTATION,
Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

THORMUND A. MILLER
JOHN MACDONALD SMITH*
CAROL A. HARRIS
ANN FINGARETTE HASSE
813 Southern Pacific Building
One Market Plaza
San Francisco, CA 94105
Telephone: (415) 541-1756
Attorneys for Petitioners

March 30, 1984

**Counsel of Record*

TABLE OF CONTENTS

	PAGE
Table of Authorities	ii
The PUC's Preemption Argument Fails To Recognize That California's Deregulation And The ICC's Assumption Of Jurisdiction Were Two Separate And Independent Events, With Different Consequences Flowing From Each	2
The ICC's Assumption Of Jurisdiction In May 1982 Necessarily Included Passenger Transportation	4
A Federal Preemption Statute Cannot Be Defeated By A State's Unexplained Refusal To Apply It	5
The *Texas* Litigation Upheld The Constitutionality Of Section 214 Of The Staggers Act And Was Not Limited to Freight Rates	6
SP Is Not Precluded From Raising The *Texas* Decision Here	6
The Staggers Act Issue Was Not Ripe for Review in 1981	8
Conclusion	10
Appendix	1a

TABLE OF AUTHORITIES

CASES	PAGE
Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967)	10
Commissioner v. *Sunnen*, 333 U.S. 591 (1948)	4
Commodity Fut. Trad. Com'n. v. *Co. Petro Marketing*, 680 F.2d 573 (9th Cir. 1982)	7
Consumers' Lobby, Etc. v. *Public Util. Com'n.*, 25 C.3d 891, 603 P.2d 41 (1979)	8
Cromwell v. *County of Sac.*, 94 U.S. 351 (1876)	4
Dump Truck Owners Assn. v. *Public Util. Comm.*, 434 U.S. 9 (1977)	9
Durley v. *Mayo*, 351 U.S. 277 (1956)	10
England v. *Medical Examiners*, 375 U.S. 411 (1964)	8
Great Lakes Properties v. *City of El Segundo*, 19 C.3d 152, 137 Cal.Rptr. 154 (1977)	5
Illinois v. *Gates*, 51 U.S.L.W. 4709 (U.S. Aug. 23, 1983).	7
INS v. *Phinpathya*, 52 U.S.L.W. 4029 (U.S. Jan. 10, 1984)	5
Lake Carriers' Assn. v. *MacMullan*, 406 U.S. 498 (1972)	9
Montana v. *United States*, 440 U.S. 147 (1979)	8
Pacific Telephone & Telegraph Co. v. *Public Util. Comm.*, 600 F.2d 1309 (9th Cir.); *cert. den.* 444 U.S. 920 (1979)	8
Pampanga Mills v. *Trinidad*, 279 U.S. 211 (1929)	5
Singleton v. *Wulff*, 428 U.S. 106 (1976)	7
State of Texas, et al. v. *United States of America, et al.*, No. A-80-CA-487, (W.D. Texas, filed December 12, 1980)	
Stembridge v. *State of Georgia*, 343 U.S. 541 (1952)	10
United States v. *Ortiz*, 422 U.S. 891 (1975)	6
Younger v. *Jensen*, 26 C.3d 397, 605 P.2d 813 (1980)	4

TABLE OF AUTHORITIES

ADMINISTRATIVE DECISIONS AND ORDERS

INTERSTATE COMMERCE COMMISSION	PAGE
Ex Parte No. 388, State Intrastate Rail Rate Authority —P.L. 96-448, Order 365 ICC 700 (May 4, 1972), 47 Fed.Reg. 20220 (May 11, 1982)	4
Decision (unreported), 47 Fed.Reg. 5786 (February 8, 1982)	4
Finance Docket 30123, Southern Pacific Transportation Company Discontinuance of Passenger Train Service in Ventura and Los Angeles Counties, CA, Decision (December 2, 1983)(unprinted)	5
PUBLIC UTILITIES COMMISSION	
Decision 92862, Case No. 10575 (April 7, 1981) (unreported)	9
Decision 93118, Case No. 10575 (May 22, 1981) (unreported)	8
Decision 93211, Case No. 10575 (June 16, 1981) (unreported)	8, 9
Decision 82-06-045, Case No. 10575 (June 2, 1982) (unreported)	8
Decision 82-10-031, Case No. 82-08-01 (October 6, 1982) (unreported)	9
Decision 82-10-041, Case No. 82-08-01 (October 8, 1982) (unreported)	9

STATUTES

FEDERAL	
Interstate Commerce Act, including the Staggers Rail Act of 1980, P.L. 96-448, 94 Stat. 1895	
49 U.S.C. § 10102(21)	5, 6
49 U.S.C. § 10102(25)	5, 6
49 U.S.C. § 10501	2
49 U.S.C. § 10501(c)	3, 5, 6
49 U.S.C. § 10713	9
49 U.S.C. § 11501	2
49 U.S.C. § 11501(b)(4)(A)	3
49 U.S.C. § 11501(b)(4)(B)	3, 4, 5
STATE	
California Public Utilities Code	
§ 1731	8
§ 1756	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SOUTHERN PACIFIC TRANSPORTATION COMPANY
Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF CALIFORNIA,
Respondent,

and

CALIFORNIA DEPARTMENT OF TRANSPORTATION,
Intervenor-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

Petitioner contends that the ninth circuit was in error in refusing to intervene to block California's assertion of continuing jurisdiction and authority over California intrastate rail passenger transportation despite Congress' enactment of explicit statutory preemptions in the Staggers Rail Act of 1980.

This erroneous result was reached, first, by incorrectly according preclusive effect to two 1981 decisions of the California supreme court denying review of state PUC proceedings which were entered without opinion or explanation.

Second, the ninth circuit, like the district court below, failed to perceive that the Staggers Act establishes not one, but two, separate preemptions, each with differing consequences. The 1981 California supreme court denials sought to be given preclusive effect were concerned only with the first preemption,

whereas in June, 1982, when petitioner sought the intervention of the federal court, a second and different preemption in California had occurred. This second preemption allowed petitioner to invoke a new cause of action as to which the prior 1981 California supreme court denials could not have had preclusive effect. The new cause of action stemmed from the assumption by the Interstate Commerce Commission ("ICC") of jurisdiction over California intrastate rail transportation on May 11, 1982, an act which, under the statutory scheme of the Staggers Act, made the provisions of the Interstate Commerce Act applicable to California and also terminated California's police power to order intrastate transportation services, passenger as well as freight.

After May 11, 1982, when the federal courts had refused to grant petitioner injunctive relief from orders which the clear language of the Staggers Act states that California could no longer make, the PUC continued to enforce its demands and, indeed, *punished* petitioner and its executives for exercising rights permitted by the ICC. The California supreme court's refusal to review those orders are the subject of the consolidated appeal also pending before this Court in No. 83-985.

The PUC's Preemption Argument Fails To Recognize That California's Deregulation And The ICC's Assumption Of Jurisdiction Were Two Separate And Independent Events, With Different Consequences Flowing From Each

The PUC's preemption argument is based upon the California district court's failure, repeated by the ninth circuit, to perceive that Section 214 of the Staggers Rail Act of 1980[1] did not provide a single preemption, but rather two separate preemptions with substantially different consequences.

As pertinent here, Section 214 amends Section 10501 of the Interstate Commerce Act, 49 U.S.C. §10501, defining the ICC's jurisdiction over transportation generally, and also amends Section 11501, 49 U.S.C. §11501, which confers authority on the ICC to regulate intrastate rail transportation.

---

[1] Section 214 is reproduced in the Appendix to this Reply ("Reply App.") at 1a-4a. "Petition App. at ____" refers to the Appendix attached to the Petition for Certiorari in No. 83-1053. "Appeal App. at ____" refers to the separate Appendix submitted with SP's opening brief in No. 83-985.

The first type of preemption arises from the amendment to 49 U.S.C. §11501 which prescribes the automatic deregulation of state rate authority in states such as California which failed to successfully certify within a period of 120 days following the effective date of the Staggers Act that their standards and procedures for regulating intrastate rail traffic were in conformity with the Interstate Commerce Act. 49 U.S.C. § 11501(b)(4)(A).[2] California made no attempt to qualify. Thus, this preemption took effect in California on the 120th day —that is, January 29, 1981—whereupon California's authority "over intrastate rates, classifications, rules and practices" was suspended. The Interstate Commerce Act did not yet apply to California intrastate transportation.

The second preemption occurred on May 11, 1982, when the ICC affirmatively took jurisdiction over California's intrastate rail transportation under 49 U.S.C. §11501(b)(4)(B). This triggered a separate preemption provision of Section 214; in order to protect the ICC's assumption and exercise of jurisdiction, states were concurrently stripped of police power to enter orders requiring new intrastate train service. 49 U.S.C. §10501(c). Moreover, the Interstate Commerce Act now applied to California transportation, and all rules and regulations promulgated by the ICC directly applied to railroads providing intrastate transportation.

The second preemption gave rise to a new cause of action which was not, and could not have been, addressed by the California supreme court in 1981. Thus, the California supreme court's denial of review of a PUC order in December 1981, entered while the 49 U.S.C. §11501(b)(4)(A) preemption was in effect but before the ICC assumed jurisdiction under 49 U.S.C. §11501(b)(4)(B), cannot have preclusive effect as to the second preemption which occurred in May 1982, five months later.

---

[2] The ICC instituted a proceeding, *Ex Parte 388, State Intrastate Rail Rate Authority—P.L. 96-448* ("Ex Parte 388") in which it issued a series of orders instructing states on the showing to be made to obtain authority to retain state jurisdiction. Appendix App. at 178a-188a and Petition App. at 97a-111a.

The order on which this petition is based was entered on June 2, 1982, after the second preemption had occurred. Both federal and state law make clear that a second suit based on a new cause of action can only be barred by res judicata if the issues raised in the second suit were—

> "actually litigated and determined in the original action." *Cromwell* v. *County of Sac.*, 94 U.S. 351, 353 (1876).

See also *Commissioner v. Sunnen*, 333 U.S. 591, 597-598, 601-602 (1948) and *Younger v. Jensen*, 26 C.3d 397, 412-413, 605 P. 2d 813, 823 (1980). That could not have been, and was not, the case here.

The ICC's Assumption Of Jurisdiction In May 1982 Necessarily Included Passenger Transportation

The PUC's contention that California intrastate rail passenger transportation is not governed by 49 U.S.C. §11501(b)(4)(B) because California never asked for certification of passenger transportation flies in the face of the applicable ICC orders in Ex Parte 388. There, states were advised that the ICC would accede to a state's request to have the ICC assume jurisdiction under 49 U.S.C. §11501(b)(4)(B) "without requiring the State to go through the exercise of filing an intentionally deficient request for certification." Ex. Parte 388, Decision served February 8, 1982, 47 Fed.Reg. 5786, Petition App. at 99a-100a. States that did not file for certification but which wanted the ICC "to assume intrastate regulation" were instructed to notify the ICC by March 10, 1982. *Id.*, Petition App. at 110a. California so notified the ICC, and, accordingly, the ICC took jurisdiction over California intrastate rail jurisdiction on May 11, 1982. *Ex Parte 388*, 365 ICC 700, 47 Fed.Reg. 20220, Appeal App. at 188a.

The PUC's contention that the ICC's assumption of intrastate jurisdiction covers only California freight rates because California's letters to the ICC refer to freight rates is also without merit. Section 214 of the Staggers Act does not provide for a bifurcation in jurisdiction between freight and passenger transportation. Moreover, under the Act, it does not really matter what California requested; a denial of certification could

only result in the ICC taking jurisdiction over *all* intrastate transportation by operation of law. 49 U.S.C. §11501(b)(4)(B); 49 U.S.C. §10501(c).

A Federal Preemption Statute Cannot Be Defeated By A State's Unexplained Refusal To Apply It

The PUC argues that the California supreme court's 1981 denials of review constitute a state court's interpretation of federal law which must thereafter be respected by the federal courts. Even if SP had had no new cause of action (see p. 4 *supra*), the PUC's claim that a state may, by inaction, and without being required to explain, refuse to apply a federal statute, is insupportable.

Section 214 of the Staggers Act is replete with references to "transportation," and "rates," which by definition encompass charges for passenger as well as freight transportation and services relating to the movement of passengers as well as property. 49 U.S.C. §10102(21) and (25). In the absence of an express restriction, not present here, it may be assumed that the terms are used throughout the statute in the same sense in which first defined in the statute. *Pampanga Mills v. Trinidad,* 279 U.S. 211, 218 (1929). And, as this Court very recently had occasion to remind, the language employed by Congress must be "our starting point." *INS v. Phinpathya,* 52 U.S.L.W. 4027, 4029 (U.S. Jan. 10, 1984). The same standards of statutory construction apply in California. *Great Lakes Properties v. City of El Segundo,* 19 C.3d 152, 156-57, 137 Cal.Rptr. 154, 156 (1977).

To say that the federal courts must yield to a state decision, which, without explanation, refuses to apply the express words and plain meaning of the federal preemption statute contrary to all principles of statutory construction, including those applied by the same court to its own state's statutes, is indefensible.[3]

[3] The Administrative Law Judge for the ICC, after careful consideration of the statute and its legislative history, found that passenger service was necessarily included in Section 214. *Southern Pacific Transportation Company Discontinuance of Passenger Train Service in Ventura and Los Angeles Counties, CA,* Finance Docket 30123 (unprinted decision served December 2, 1983), Appeal App. at 211a-212a.

The *Texas* Litigation Upheld The Constitutionality Of Section 214 Of The Staggers Act And Was Not Limited To Freight Rates

The PUC argues that the proceedings before the Texas federal district court concerned only the constitutionality of Section 214 of the Staggers Act as it pertains to intrastate freight rates. A review of Section 214, and of California's pleadings in the *Texas* case, shows that the argument is without foundation.

The word "transportation" appears in section 214 eight times, and, by definition, includes both freight and passenger transportation. 49 U.S.C. §10102(25). The word "rate" or "rates" appears in section 214 eleven times, and by definition, includes passenger fares as well as freight rates. 49 U.S.C. § 10102(21). Section 214 further contains the provision, critical to this litigation, which takes away the authority of uncertified states to order new intrastate *transportation* if the ICC takes jurisdiction over intrastate *rates*. Section 214(c)(4), 94 Stat. 1915, amending Section 10501(c).

California's intervening complaint (Reply App. at 3a) and its joint motion for summary judgment in the *Texas* action did not distinguish between freight and passenger jurisdiction but sought a declaration that Section 214, in its entirety, was unconstitutional.

California had ample opportunity to argue the passenger issue in *Texas*, and the fact that it chose not to do so does not justify the belated claim that the *Texas* decision did not extend to passenger matters.

SP Is Not Precluded From Raising The *Texas* Decision Here

Assuming, as argued by the PUC, that the significance of the *Texas* litigation was not argued before the ninth circuit, it does not follow that consideration of the point is precluded here. First of all, the significance of the *Texas* litigation is not a new legal "issue"; it is simply another legal argument on the *issue* of res judicata, which *is* a central issue in this petition. *United States v. Ortiz*, 422 U.S. 891 (1975) is not to the contrary.

Second, even if it were a new "issue," only cases arising from state courts in which the state has not been given an opportunity to first consider the issue, are subject to such an automatic bar. *Illinois v. Gates,* 51 U.S.L.W. 4709 (U.S. Aug. 23, 1983). As shown in SP's Petition for Certiorari at 10-11, this argument was raised and argued to the California supreme court. Moreover, the argument has also been made in the companion state court appeal, No. 83-985, *Southern Pacific Transportation Co. v. Public Utilities Commission,* and was addressed on the merits by the PUC in its Motion to Dismiss or Affirm at 15-16.

Third, in the federal courts new issues may be raised when circumstances warrant. *Singleton v. Wulff,* 428 U.S. 106, 121 (1976). In fact, the rule in the ninth circuit is that new arguments—and even new issues—may be freely raised on appeal in the circumstances present here:

> "It is well-settled in this circuit that where the new issue is purely a legal one, the injection of which would not have caused the parties to develop new or different facts, it is proper to resolve it on appeal." *Commodity Fut. Trad. Com'n. v. Co. Petro Marketing,* 680 F.2d 573, 581 (9th Cir. 1982).

The Staggers Act Issue Was Not Ripe for Review in 1981

The PUC argues that immediate judicial relief from this Court was available to SP following the 1981 California supreme court's denials of review of PUC orders entered at an intermediate stage of the PUC proceedings notwithstanding the fact that all of the operative provisions directed against SP had been stayed. It further argues that because SP failed to seek relief from this Court at that time, SP is forever foreclosed from having its Staggers Act claims adjudicated.

This argument is based on the unfounded assumption that the 1981 denials were final judgments on the Staggers Act issue. There is nothing in the decisions themselves, which were entered without opinion, to substantiate this. Moreover, SP's pleadings had informed the California court of the pendency of the *Texas* case and that SP "did not believe the issue is properly

before the Court at this time." (Petition App. at 91a).[4] SP also explicitly requested the right to brief the issue, in the event the court decided sua sponte to address it.

As *Consumers Lobby, Etc.* v. *Public Util. Com'n.*, 25 C.3d 891 (1979) makes clear, the summary denials of review by California's highest court may be for purely procedural reasons. *Id.* at 902-905. In *Consumers,* the California supreme court candidly admitted that when petitions for writs of review are filed from PUC orders issued midstream in ongoing PUC proceedings,[5] the court may be uncertain whether the PUC action is ripe for review. 25 C.3d at 903-904, 603 P.2d at 48. And, an otherwise meritorious petition will be denied if the injury is still speculative, as was the case here.[6]

The PUC urges that its stay of the orders against SP was intended to facilitate subsidy negotiations between SP and Caltrans and did not contemplate possible reconsideration by the PUC of substantive provisions of its decisions. This is a *post hoc* rationalization which has no support in the order itself. To the contrary, the stay order reveals that the PUC was in the process of considering new proposed evidence. (Decision 93118, Case No. 10575 (May 22, 1981)(unreported), Appeal App. at 100a). Thereafter, the PUC did modify its core decision on June 16, 1981 (Decision 93211, Case No. 10575 (unreported) Appeal App. at 102a) and again on June 2, 1982 (Decision 82-06-045, Case No. 10575 (unreported) Appeal App. at 115a), at

---

[4] The PUC argues that *England v. Medical Examiners,* 375 U.S. 411, is limited in its application only to abstention cases. Not so; for application of the *England* principles in a non-abstention case, see *Montana* v. *United States,* 440 U.S. 147, 163 (1979).

[5] Under California law, an application for rehearing must be made within 30 days "[a]fter *any* order or decision has been made" by the PUC raising objections "in respect to *any* matters determined in the action or proceeding" Cal. P.U. Code § 1731 (emphasis added). The petition for writ of review must be filed within 30 days after rehearing has been denied. Cal. P.U. Code § 1756.

[6] *Pacific Telephone & Telegraph Co.* v. *Public Util. Comm.*, 600 F.2d 1309 (9th Cir.), *cert. den.* 444 U.S. 920 (1979) is inapposite because the issues which gave rise to the federal court challenge in that case had unquestionably been decided by the PUC and by the California supreme court. Also, unlike this case, in *Pacific Telephone* the ninth circuit did look at petitioners' federal claims, but found them "frivolous." *Id.* at 1312, fn. 6. In the instant case the federal challenge to California's jurisdiction was never decided at all.

which time it also lifted the stay. Further hearings were held before the PUC in September 1982 as a result of which more changes were made. (Decision 82-10-031, Case No. 82-08-01 (October 6, 1981) (unreported) Appeal App. at 125a; Decision 82-10-041, Case No. 82-08-01 (October 18, 1981) (unreported) Appeal App. at 131a). It was not until October 1982 that SP was actually compelled to institute the service.

The PUC's attempt to distinguish *Dump Truck Owners Association Assn. v. Public Util. Comm.*, 434 U.S. 9 (1977) by claiming there was no possibility here that the PUC might have modified its decision so as to moot the controversy is equally unavailing. Several events made it "sufficiently likely" that the PUC would "significantly modify" its orders, thus rendering an immediate appeal premature. *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498, 512 (1972).

For one thing, the PUC had imposed its stay shortly after it had authorized the motion of the County of Los Angeles, the leading proponent of the rail project, to withdraw from the case; this left Caltrans as the sole subsidizing agency. Decision 92862, Case No. 10575 (April 7, 1981) (unprinted) Appeal App. at 73a. Shortly thereafter, the PUC modified the compensation requirements of its order for the stated purpose of avoiding an undue burden on interstate commerce, despite a strenuous protest from Caltrans that the new compensation requirements exceeded Caltrans' ability to pay. Decision 93211, *supra*, Appeal App. at 110a, 112a. At this point, Caltrans could have elected to abandon its request for service as County had done. Alternatively, Caltrans could have consented to pay SP revenue adequate compensation in a private contract.[7] Either result would have mooted the controversy. Thus, the PUC's suggestion that there was no possibility of further developments, legal or otherwise, that would moot the commuter train controversy is completely at odds with reality.

[7] The Staggers Act amended Section 10713 of the Interstate Commerce Act, 49 U.S.C. § 10713 to allow railroads to enter into confidential transportation contracts with purchasers of rail services.

Finally, had SP appealed the 1981 denials, this Court would in all probability have refused to take jurisdiction for two reasons. First, this Court might well have concluded that these 1981 denials rested on nonfederal grounds. *Durley v. Mayo,* 351 U.S. 277 (1956) and *Stembridge v. Georgia,* 343 U.S. 541 (1952). Second, this Court might have withheld review because no harm to SP would flow from the stayed PUC order. *Abbott v. Gardner,* 387 U.S. 136 (1967).

CONCLUSION

This Court should not let stand the erroneous ruling of the ninth circuit, which is at odds with the Congressional purpose and objectives underlying the Staggers Act amendments to the Interstate Commerce Act, disregards the literal language of the statute, and conflicts with the contemporaneous construction of the ICC. The federal question presented is of continuing importance to these parties and is significant to all states and all rail carriers. Review should be granted.

Dated: March 30, 1984

Respectfully submitted,

THORMUND A. MILLER
JOHN MACDONALD SMITH
(Counsel of Record)
CAROL A. HARRIS
ANN FINGARETTE HASSE
813 Southern Pacific Building
One Market Plaza
San Francisco, CA 94105
Telephone: (415) 541-1756

Attorneys for Petitioners

SEC. 214. (a) Section 11501(a) of title 49, United States Code, is amended—

(1) by striking out paragraph (2);

(2) by striking out "(a)(1)" and inserting in lieu thereof "(a)";

(3) by striking out "subchapter I or IV" and inserting in lieu thereof "subchapter IV"; and

(4) by redesignating subparagraphs (A) and (B) as paragraphs (1) and (2), respectively.

(b) Section 11501 of title 49, United States Code, is amended by redesignating subsections (b) and (c) as subsections (d) and (e), respectively, and by inserting immediately after subsection (a) the following new subsections:

"(b)(1) A State authority may only exercise jurisdiction over intrastate transportation provided by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title if such State authority exercises such jurisdiction exclusively in accordance with the provisions of this subtitle.

"(2) Within 120 days after the effective date of the Staggers Rail Act of 1980, each State authority exercising jurisdiction over intrastate rates, classifications, rules, and practices for intrastate transportation described in paragraph (1) of this subsection shall submit to the Commission the standards and procedures (including timing requirements) used by such State authority in exercising such jurisdiction.

"(3)(A) Within 90 days after receipt of the intrastate regulatory rate standards and procedures of a State authority under paragraph (2) of this subsection, the Commission shall certify such State authority for purposes of this subsection if the Commission determines that such standards and procedures are in accordance with the standards and procedures applicable to

regulation of rail carriers by the Commission under this title. If the Commission determines that such standards and procedures are not in such accordance, it shall deny certification to such State authority, and such State authority may resubmit new standards and procedurs to the Commission for review in accordance with this subsection.

"(B) The standards and procedures existing in each State on the effective date of the Staggers Rail Act of 1980 for the exercise of jurisdiction over intrastate rail rates, classifications, rules, and practices shall be deemed to by certified by the Commission from that date until the date an initial determination is made by the Commission under subparagraph (A) of this paragraph.

"(4)(A) Any State authority which is certified by the Commission under this subsection may use its standards and procedures in exercising jurisdiction over intrastate rail rates, classifications, rules, and practices during the 5-year period commencing on the date of such certification. Any State authority which is denied certification or which does not seek certification may not exercise any jurisdiction over intrastate rates, classifications, rules, and practices until it receives certification under this subsection.

"(B) Any intrastate transportation provided by a rail carrier in a State which may not exercise jurisdiction over an intrastate rate, classification, rule, or practice of that carrier due to a denial of certification under this subsection shall be deemed to be transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title.

"(5)(A) Certification of a State authority under this subsection is valid for the 5-year period, the State authority shall resubmit its intrastate regulatory standards procedures to the Commission for subsequent certification in accordance with this subsection.

"(B) During any 5-year certification period, a State may not change its certified standards and procedures without notifying and receiving express approval from the Commission.

"(6) Notwithstanding any other provision of this subtitle, a State authority may not exercise any jurisdiction over general rate increases under section 10706 of this title, inflation-based rate increases under section 10712 of this title, or fuel adjustment surcharges approved by the Commission.

"(c) Any rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may petition the Commission to review the decision of any State authority, in any administrative proceeding in which the lawfulness of an intrastate rate, classification, rule, or practice is determined, on the grounds that the standards and procedures applied by the State were not in accordance with the provisions of this subtitle. The Commission shall take final action on any such petition within 30 days after the date it is received. If the Commission determines that the standards and procedures were not in accordance with the provisions of this subtitle, its order shall determine and authorize the carrier to establish the appropriate rate, classification, rule, or practice."

(c)(1) Section 11501(d)(2) of title 49, United States Code, as redesignated by subsection (b) of this section, is amended by inserting "and chapter 107 of this title" immediately before the period at the end of the first sentence.

(2) Section 10103(a) of title 49, United States Code, as redesignated by striking out "The" and inserting in lieu thereof "Except as otherwise provided in this subtitle, the".

(3) Section 10501(a)(2) of title 49, United States Code, is amended by inserting "such jurisdiction is not limited by subsection (b) of this section or the extent" immediately after "to the extent".

(4) Section 10501(c) of title 49, United States Code, is amended by inserting "(1) the transportation is deemed to be subject to the jurisdiction of the Commission pursuant to section 11501(b)(4)(B) of this title, or (2)" immediately after "unless".

(5) Section 10501 of title 49, United Staes Code, is amended by adding at the end thereof the following new subsection:

"(d) The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11501(b) of this title over transportation by rail carriers, and the remedies provided in this title with respect to the rates, classifications, rules, and practices of such carriers, is exclusive.".

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

THE STATE OF TEXAS AND RAILROAD COMMISSION OF TEXAS by and through Mark White, Attorney General of Texas,

Plaintiffs,

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants.

No. A 80 CA 487

INTERVENORS-COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff-intervenors the People of the State of California and the Public Utilities Commission of the State of California, (California) by their attorneys, allege as follows:

JURISDICTION AND VENUE

1. This is a civil action for a declaratory judgment arising under the Constitution of the United States, Article 10 and the Rail Act of 1980, Public Law 96-448 ("Staggers Act"). This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. 1331.

2. Defendant Interstate Commerce Commission is an agency of the United States created by the Interstate Commerce Act.

BACKGROUND

The Staggers Rail Act of 1980

1. The Staggers Act was enacted on October 1, 1980. Primarily, the Act is a deregulation measure designed to give railroads increased rate setting flexibility.

In order to carry out a national policy of uniform rate regulation, Section 214 of the Staggers Act pre-empts the jurisdiction of state authorities in three important areas: general rate increases, inflation based rate increases and fuel surcharges. Additionally, the Staggers Act requires that a state exercise its remaining jurisdiction over rail carriers in conformance with the standards and procedures set forth in the Staggers Act. The ICC ensures that states are following the Staggers Act by first requiring a state to officially agree to comply with the provisions of the Staggers Act by January 29, 1981 and then grant it certification within 90 days of this agreement, and secondly, once a state is certified, by allowing a rail carrier to petition the ICC to review a state's decision regarding intrastate rates on the ground that the decision is not in conformity with the Staggers Act.

CAUSE OF ACTION

1. Section 214 of the Staggers Act is violative of the Tenth Amendment of the United States Constitution.

2. By reason of the facts set forth above, this case presents an actual controversy within the jurisdiction of this Court, which may declare the rights and oligations of the parties.

WHEREFORE, plaintiff-intervenor California respectfully request that this court:

1. Declare and adjudge that Section 214 of the Staggers Act is unconstitutional; and

2. Grant such other and further relief as the Court may deem just and proper.

Respectfully submitted,

/s/ JANICE E. KERR
Janice E. Kerr

/s/ J. CALVIN SIMPSON
J. Calvin Simpson

/s/ GRETCHEN DUMAS
Gretchen Dumas

DATED: December 22, 1980